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No. 91-999

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GARMAN CONSTRUCTION COMPANY,

Petitioner,

v.

WILLIAM F. MARTIN, GEORGE F. HUTCHESON, RAY JOHNSON, as Trustees, *et al.*,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Page

Contractors, Laborers, Teamsters & Engrs. Health & Welfare Fund v. Harkins Constr. & Equip. Co., 733 F.2d 1321 (8th Cir. 1984) 3

Contractors Southern Cal. Admin. Corp. v. J.L.M. Constr. Co., 809 F.2d 584 (9th Cir. 1987) 3

John Deklewa & Sons, 282 N.L.R.B. No. 184 (1977) 2

Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 103 S. Ct. 830 (1988) 1

Leavesley-McCollum Corp., NLRB Advice Mem. No. 28-CA-4132 (1977) 2

Local 103, Ironworkers v. NLRB (Higdon Constr. Co.),
434 U.S. 335 (1978) 4

Local 92, Ironworkers v. B & B Steel Erectors, Inc.,
850 F.2d 1551 (11th Cir. 1988) 3

McNeff v. Todd,
461 U.S. 260 (1983) 1

Operating Engrs. Pension Trust v. Beck Engrg & Surveying Co.,
746 F.2d 557 (9th Cir. 1984) 3

Sheet Metal Workers Int'l Assn v. West Coast Sheet Metal Co.,
1992 U.S. App. LEXIS 895 (9th Cir. Jan. 28, 1992) 2

Washington Area Carpenters Welfare Fund v. Overhead Door,
681 F.2d 1 (D.C. Cir. 1982) 3

STATUTES

Labor Management Relations Act,
§ 8(d), 29 U.S.C. § 158(d) 3
§ 302(c)(4), 29 U.S.C. §186(4) 2

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents avoid the three crucial pillars upon which Petitioner Garman Construction Company ("Garman") demonstrated that the case presents important issues warranting this Court's supervisory jurisdiction.

1. First, the Respondents make no attempt to harmonize the decision below with this Court's decisions in *McNeff v. Todd*, 461 U.S. 260 (1983), and *Laborers' Health & Welfare Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 103 S. Ct. 830 (1988). Both cases involved trust fund plaintiffs attempting to compel contributions from an employer.

Petitioner Garman did everything suggested by the Court in *McNeff* and *Advanced Lightweight* to repudiate the prehire agreement with Local 150. It paid contributions up to the date of repudiation, gave actual notice to the Respondents of the agreement's termination, and filed representation petitions with the National Labor Relations Board. In these circumstances, it is

obvious that Garman had successfully terminated a collective bargaining relationship with Local 150 as the Board construes the Act both before *John Deklewa* & Sons, 282 N.L.R.B. No. 184 (1987), and after it.[1] Without a Board recognizable bargaining relationship, employer-union agreements and trust fund payments plainly violate § 302(c) of the Act, 29 U.S.C. § 186(c).

The Respondents' argument that trust fund payments should continue in the absence of a bargaining relationship is extraordinary in assertion and utterly to the benefit of no ERISA policy. As the Ninth Circuit recently held in *Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co.*, 1992 U.S. App. LEXIS 895 (9th Cir. Jan. 28, 1992):

> A contract to contribute to a trust fund of a Union with which West Coast has no ongoing collective bargaining relationship makes no sense. The trust fund provisions have no legal effect when the Union is no longer the certified representative of West Coast's employees. Slip Op. at 935.

In *West Coast*, the district court had held that the employer must still contribute to a trust fund even after decertification of the union because it believed, as the Seventh Circuit did below, that "the only recognizable defenses" assertable under ERISA are to illegal contracts "void *ab initio*." The Ninth Circuit ruled to the contrary. It reversed "because the collective bargaining agreement became inoperative prospectively, it thereafter had no force or legal effect....Justice also persuades us that West Coast's obligation to the Trust Funds terminated with the decertification of the Union."

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[1]In a one-man unit, the Board has consistently held that an employer "is free to repudiate that contract at a given project or location where the union fails to show majority support, 'such contracts [being]voidable by either party.'" See *Leavesley-McCollum Corp.*, Advice Mem. No. 28-CA-4132 (1977), *quoting Local Union 103 v. NLRB (Higdon Contr. Co)*, 535 F.2d 87 (D.C. Cir. 1976).

Thus, as *amicus curiae* correctly points out, the Seventh Circuit and the Respondents continue an illogical argument. The latter would advance the proposition that contracts terminated upon union decertification under a Board supervised election (thereby similarly evoking a Board decision on the existence of a lawful collective-bargaining *relationship* as occurred with Petitioner), should incredibly remain enforceable against the employer although the signatory union is stripped of its representative status and the contract becomes void. The Respondents' interpretation is entirely contrary to the provisions of § 8(d) of the Act, 29 U.S.C. § 158(d).[2]

2. Second, a discrete conflict exists between the Seventh Circuit here and the Ninth Circuit in *Operating Engrs. Pension Trust v. Beck Engr'g & Surveying Co.*, 746 F.2d 557 (9th Cir. 1984), on whether to allow judicial enforcement of trust fund obligations under ERISA to continue following the date of repudiation of a prehire agreement in one-man bargaining units. The Respondents make *no* attempt to explain how the Seventh Circuit's decision is not contrary to decisions in all other circuit courts. Other courts have concluded that an employer's effective repudiation under the NLRA bars trust fund recovery in *Local 92, Ironworkers v. B & B Steel Erectors, Inc.*, 850 F.2d 1551 (11th Cir. 1988), *Contractors Southern Cal. Admin. Corp. v. J.L.M. Constr. Co.*, 809 F.2d 584, 598 (9th Cir. 1987), *Contractors, Laborers, Teamsters & Engrs. Health & Welfare Fund v. Harkins Constr. & Equip. Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984), and *Washington Area Carpenters' Welfare Fund v. Overhead Door*, 681 F.2d 1, 9 (D.C. Cir. 1982). The reasoning in these cases is the far better interpretation of ERISA and the NLRA.

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[2] "The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection *shall become inapplicable* upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title...."

3. Respondents' opposition also constructs a novel ruling based upon the Board's preliminary finding that a contract by Petitioner with Local 150 existed. If a contract was not in existence between Petitioner and Local 150, then the Board would have dismissed the case immediately after making that finding. But, because the Board found that Garman did not give a ninety-day notice of termination of the *prior* prehire agreement under that agreement, whether Garman might be bound to honor the roll-over agreement for another three years was squarely presented.[3]

Applying *Deklewa* to Petitioner Garman's situation, the Board found that Garman's "repudiation" under *Deklewa* principles required consideration of the one-man unit rule for which the Board further agreed "with the result reached by the judge and [to] dismiss the 8(a)(5) and (1) allegation in the complaint concerning the Operating Engineers." 28a. Consequently, Garman's situation is explicitly an exception to the *Deklewa* rule that otherwise requires an election to invalidate a contract when an election can in fact be held.

The Respondents' brief states that the Board's "decision and order created no exception to *Deklewa* to allow an employer with a one man unit to unilaterally repudiate an agreement before expiration." Opp. at 7. But, the Board in *Garman* explicitly determined the one-man unit rule still applied: "we find that the 'one-man unit' rule is the proper rule in this case." 28a. If the Respondents' argument had any merit, the Board would have said the one-man unit rule no longer applied in the face of *Deklewa*.

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[3]Noticeably absent from the Respondents' discussion is the fact that Garman filed a representation petition with the Board in anticipation of the decision in *Deklewa*. Because a one-person unit is not an "appropriate" unit under the Act, a union cannot demonstrate majority support in such a unit. Consequently, the rule of repudiation at any time, explained by the Court in *Local 103, Ironworkers v. NLRB (Higdon Constr. Co.)*, 434 U.S. 335, 345 (1978) ("The employer's duty to bargain and honor the contract is *contingent* on the union's attaining majority support at the various construction sites."), still applies.

The Board expressly refused to make that ruling. The decision resulted in no issuance of a complaint against Garman.

In sum, Respondents have made no effort to show an absence of conflicting appellate decisions. They have not shown that the question presented is not important to the administration of the NLRA and ERISA or that the facts presented by the case are unique or not of import. Because of the substantial evidence offered by *amicus curiae* that the decision below affects thousands of construction industry contractors (consistent with the record here indicating the pervasiveness of one-man units in the construction industry), this case warrants the grant of certiorari.

CONCLUSION

For the reasons set forth above and in the Petition, Petitioner Garman respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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